Supreme Court, U.S.
FILED
AUG 29 1991
OFFICE OF THE CLERK

No. 91-52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

In the Matter of the Application of SHIRLEY MIDDLETON,

Petitioner,

—against—

CESAR PERALES, as Commissioner of the New York State Department of Social Services, and WILLIAM J. GRINKER (as successor to HARVEY ROBINS), as Commissioner of the New York City Department of Social Services,

Respondents.

RESPONDENT PERALES' BRIEF IN OPPOSITION

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent Cesar Perales
120 Broadway, Rm. 24-130
New York, New York 10271
(212) 341-2558

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

ROBERT J. SCHACK
Assistant Attorney General*
of Counsel

*Attorney of Record

COUNTER-STATEMENT OF QUESTION PRESENTED

Does petitioner's allegation that the New York State Department of Social Services failed to ensure that the New York City Department of Social Services complied in a timely manner with a Decision After Fair Hearing to provide petitioner with food stamp benefits, standing alone without a claim or showing at the administrative proceeding or in the trial court that the State agency had a practice or policy of failing to supervise the City agency's compliance, raise a substantial federal claim warranting an award of attorneys' fees under 42 U.S.C. § 1988?

TABLE OF CONTENTS

	PAGE
Counter-Statement of Question Presented.....	i
Reasons for Denying the Writ.....	1
Conclusion.....	3

TABLE OF AUTHORITIES

I. Cases PAGE

Matter of Thomasel v. Perales, 161 A.D.2d 646 (2d Dep't 1990), *leave to appeal granted*, 77 N.Y.2d 808 (1991) 2, 3

II. Statutes

United States Constitution Article 6 2

42 U.S.C. § 1983 2

42 U.S.C. § 1988 ..... i, 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

In the Matter of the Application of SHIRLEY MIDDLETON,

Petitioner,

—against—

CESAR PERALES, as Commissioner of the New York State Department of Social Services, and WILLIAM J. GRINKER (as successor to HARVEY ROBINS), as Commissioner of the New York City Department of Social Services,

Respondents.

RESPONDENT PERALES' BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

State respondent Cesar Perales, Commissioner of the New York State Department of Social Services, agrees with respondent William J. Grinker, Commissioner of the New York City Department of Social Services, that the petition for certiorari should be denied, substantially for the reasons set forth in respondent Grinker's brief in opposition.[1]

The petition should be denied for the additional reason that the same issues raised by petitioner herein as to the State agency's single state agency responsibilities and its super-

1 Commissioner Grinker has been succeeded in office by Barbara J. Sabol. Since this is a suit against the respondents in their official capacity, Ms. Sabol should be substituted for Mr. Grinker as the proper respondent.

vision of the City agency are the subject of an appeal to be argued to the New York Court of Appeals on October 17, 1991, in *Matter of Thomasel v. Perales*, 161 A.D.2d 646 (2d Dep't 1990), *leave to appeal granted*, 77 N.Y.2d 808 (1991).

The first question raised for review herein is whether the appellate courts in New York have "repudiated the Supremacy Clause of the United States Constitution by repudiating the federal standards for awarding attorneys fees under 42 U.S.C. § 1988?" Petition, p. i. Ms. Middleton's second question is "Whether the Petitioner alleged a substantial federal claim warranting an award of attorney fees under 42 U.S.C. § 1988?" *Id.* at i. Her claim against the State respondent is that the State agency allegedly failed "to ensure that its directives were implemented within the specified time period, as the federal regulations explicitly require it to do." *Id.* at 21.

In *Thomasel*, the appellant parallels petitioner's questions by presenting, *inter alia*, the following questions: "Does respondent Perales violate petitioner's federal rights if he fails to compel the city agency to continue her full ADC benefits during the pendency of her administrative appeal?", "If petitioner's federal rights are violated by the pre-hearing reduction of her AFDC benefits, may she resort to 42 U.S.C. 1983 to enforce those rights?", and "If so, is petitioner entitled to an attorney's fee award pursuant to 42 U.S.C. 1988 even if the court decided her appeal on state law ground?" Brief for Petitioner-Appellant at 3-5.[2]

In addition to arguing in *Thomasel*, as respondent Grinker has shown here, that the federal issues raised are not in fact substantial, the State respondent will argue in *Thomasel* that his agency does properly supervise local agencies and that it takes effective action as the single state agency to ensure compliance with its directives. Thus, both sides in *Thomasel* are presenting the New York Court of Appeals with essen-

---

2 As petitioner does here, the *Thomasel* appellant argues extensively that the State Supreme Court's Appellate Division for the Second Department has a practice and policy of denying attorney fees to petitioners who have raised substantial federal claims. *Id.* at 12-18.

tially the same arguments that would be briefed to this Court in the present case.

The decision in *Thomasel* will clarify the State agency's duty to supervise and address the derivative issue of petitioner's entitlement to fees. Review of the Court of Appeals' decision can then be sought in this Court. This case is inappropriate, however, to address those questions, since the Court of Appeals did not pass on its merits and the Appellate Division did not have the benefit of that Court's guidance.

CONCLUSION

The Petition For A Writ Of Certiorari Should Be Denied.

Dated: New York, New York
August 30, 1991

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent Cesar Perales
120 Broadway, Rm. 24-130
New York, New York 10271
(212) 341-2558

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

ROBERT J. SCHACK
Assistant Attorney General*
of Counsel

* Attorney of Record